SUPREME COURT, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

No:

McDONALD PONTIAC-CADILLAC-GMC, INC.
A Michigan Corporation,

Petitioner

v

PROSECUTING ATTORNEY
FOR THE COUNTY OF SAGINAW

Respondent

PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT
OF THE STATE OF MICHIGAN

OF RECORD:

Thomas Warren McDonald, Jr.
Patrick D. McCoy
Karen J. Choate
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3126 Davenport Street
Saginaw, Michigan 48602
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Counsel for Petitioner

10 pp

QUESTIONS PRESENTED

1. Whether MCL 435.251; MSA 9.2701, in creating a legislative classification of those engaged in the "business of buying, selling, trading or exchanging new, used, or second hand motor vehicles" and prohibiting said businesses from conducting business on Sunday, while allowing other retailers of similar durable consumer goods to sell on Sunday, is a denial of equal protection and violative of said merchants due process rights?

2. Whether MCL 435.251; MSA 9.2701, is an invalid excercise of the police power by the Michigan Legislature?

3. Whether it is the duty of the judiciary to inquire and analyze whether a legislative act bears a reasonable relation to a legitimate legislative purpose when that statutes invalidity is challenged on exclusively constitutional grounds?

4. Whether said statute impinges upon said merchants constitutional right to contract?

5. Whether the disparity between the various states allowance and disallowance of automobile sales on Sundays impacts upon interstate commerce and is a violation of the Commerce Clause.

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The petitioner, McDONALD PONTIAC-CADILLAC, GMC, INC., a Michigan Corporation, respectfully prays that a Writ of Certiorani issue to review the Judgment of the Michigan Supreme Court denying a Petition for Leave to Appeal and the denial of a Motion for Reconsideration by the Michigan Supreme Court entered on April 1, 1987.

OPINIONS BELOW

The Opinion of the Hon. Joseph R. McDonald of the Tenth Judicial Circuit, County of Saginaw, State of Michigan, which was entered on December 5, 1984, is unreported and is attached to this petition as Appendix A. The opinion of the State of Michigan, Court of Appeals, Per Curiam, the Hon. Robert J. Dankof, Chief Judge, the Hon. Vincent J. Brennan,

and the Hon. John Gillis, Jr., Circuit Judge sitting on the Court of Appeals by assignment, presiding, which was entered on March 18, 1986, and which is reported at 150 MICH APP 52(1986) is attached as Appendix B. The Denial of Leave of Appeal by the Michigan Supreme Court entered on October 22, 1986, reported at 426 Mich 866 is attached as Appendix C. The Denial of the Motion for Reconsideration is attached as Appendix D. An Affidavit of Timely Filing of a Motion for Reconsideration is attached as Appendix "E."

JURISDICTION

The Judgment of the Michigan Supreme Court was entered on October 22, 1986, and a timely Motion for Reconsideration was filed within 21 days of that date as required by MCR 7.313(E). Denial of the Motion for Reconsideration for lack of timely filing was entered on April 1, 1987. An Affidavit of Timely Filing, however, is attached as Affidavit E. This Court's Jurisdiction is invoked pursuant to 28 USC Section 1257(2) and 28 USC Section 1257(3).

STATUES AND REGULATIONS INVOLVED

Michigan Public Act 66 of the Public Acts of 1953 Section 1-4, MCL 435.251, MSA 9.2701 provides as follows:

Sec. 1 It shall be unlawful for any person, firm or corporation to engage in the business of buying, selling, trading or exchanging new, used or second-hand motor vehicles or offering to buy, sell, trade or exchange, or participate in the negotiation thereof, or attempt to buy, sell, trade or exchange any motor vehicle or interest therein, or of any written instrument pertaining thereto, on the first day of the week, commonly called Sunday.

Sec. 2 That it shall be unlawful for any person, firm or corporation to keep open their establishment or place of business on the first day of the

week, commonly called Sunday, for any of the purposes mentioned in section 1 of this act; provided, however, that nothing in his Act shall apply to any person who conscientiously believes that the seventh day of the week, from sunset Friday to sunset Saturday, should be observed as the Sabbath and who actually refrains from conducting or engaging in the business of buying, selling, or offering for sale motor vehicles, or performing other secular business on that date.

Sec. 3 Any person, firm or corporation who violates or offends against that provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by the laws of this state, or by the Court, in its discretion, suspending or revoking

the dealer's license to do business within the state or by fine and im prisonment and suspension and or invocation in the discretion of the Court.

Sec. 4 This act shall not apply to counties having a population under 130,000 inhabitants according to the latest or each succeeding federal decennial census. MCL 435.251, et seq.; MSA 9.2701, et seq.

Chapter 435 of the Michigan Compiled Laws, entitled "Sundays and Holidays" originally contained numerous provisions regulating Sunday business transactions. The Legislature had repealed all the Sunday closing laws with the exception of those governing car sales by 1974.

STATEMENT OF THE CASE

On March 14, 1983, Plaintiff-Appellant filed a Declaratory Judgment Complaint challenging the constitutionality of P.A. 1953, No. 66, effective May 12, 1953. Said statute, MCLA 435.251, et seq; MSA 9.2701, et seq, states as follows:

> "Sec. 1. It shall be unlawful for any person, firm or corporation to engage in the business of buying, selling, trading or exchanging new, used or second-hand motor vehicles or offering to buy, sell, trade or exchange, or participate in the negotiations thereof, or attempting to buy, sell, trade or exchange any motor vehicle or interest therein, or of any written instrument pertaining thereto, on the first day of the week, commonly called Sunday."
>
> "Sec. 2. That it shall be unlawful for any person, firm or corporation to keep open their

establishment or place of business on the first day of the week, commonly called Sunday, for any of the purposes mentioned in Section 1 of this act: Provided, however, That nothing in this act shall apply to any person who conscientiously believes that the seventh day of the week, from sunset Friday to sunset Saturday, should be observed as the Sabbath and who actually refrains from conducting or engaging in the business of buying, selling or offering for sale motor vehicles, or performing their other secular business on that date."

"Sec. 3. Any person, firm or corporation who violates or offends against the provisions of this act shall be punished by the laws of this state, or by the court, in its discretion, suspending or revoking the dealer's license to do business with the state, or by the court, in its discretion, suspending or revoking the dealer's license to do business with the state, or by fine and discretion of the court."

"Sec. 4. This act shall not apply to counties having a population under 130,000 inhabitants according to the latest of each succeeding federal decennial census."

Chapter 435 of Compiled Laws entitled "Sundays and Holidays" originally contained numerous statutes prohibiting Sunday transactions. The Michigan Legislature has repealed all Sunday closing laws except for the prohibition to sell motor vehicles.

The constitutionality of Section 4 of said statute hereinabove was challenged in the case of The Irishman's Lot, Inc. v Secretary of State, 338 Mich 662 (1954). That case dealt only

with the narrow part of the statute creating a separate class of counties having a population under 130,000 inhabitants, and the Michigan Supreme Court upheld its constitutionality on that narrow point only.

This issue has also been brought before the Honorable Robert I. Boros, of the Kalamazoo County Circuit Court. In 1983, Judge Boros held said statute unconstitutional and invalid in the matter of the People of the State of Michigan v Richard Loehr d/ba Dick Loehr's Auto Super Mart, File No. D 823 00 675 AV on equal protection and due process grounds. (Appendix F)

On May 12, 1976 Frank J. Kelley, Michigan Attorney General, issued Opinion 4958 which stated that the Michigan Legislature has abandoned any scheme to set aside a day for public rest and relaxation and that citizens are now generally permitted to carry on their business on Sunday without prohibition. (Appendix G) That Opinion was directed towards financial institutions and states in part:

> "...that banks and savings and loan associations, like other forms of businesses, may operate on Sundays".

Petitioner and Respondent in the present matter stipulated to waive their rights to oral argument at a hearing and instead submitted their Briefs on the issues to the Saginaw County Circuit Court.

Thereafter, on December 5, 1984, the Hon. Joseph R. McDonald, Circuit Judge, issued his Opinion upholding the constitutionality of the statute and denied Petitioner's prayer for relief.

Petitioner filed a Claim of Appeal on or about December 20, 1984, a Stipulation to Extend the Time for Filing Petitioner's Brief on or about February 15, 1985, Brief of Plaintiff-Appellant on or about March 15, 1985, and presented oral argument on or about July 15, 1985.

In a per curiam published Opinion by the Hon. Robert J. Danhof, Hon. Vincent J. Brennan and Hon. John Gillis, Jr., on or about March 18, 1986, the Court of Appeals affirmed the court below and denied Petitioner's Relief.

Petitioner is an automobile agency selling new and used automobiles and trucks. The business is located on State Highway M-58, which is a 6 lane traffic artery in Saginaw Township. This commercial road contains many other businesses such as restaurants, gas stations, party stores, auto parts, beer, wine, liquor, recreational vehicles, hardware, guns, two shopping centers, furniture and appliance stores, and many other similar commercial enterprises. Other businesses located on the same commercial strip are opened varying hours seven days per week. Petitioner began operations on September 25, 1980, and employs in excess of 125 people.

To accommodate their customers, Petitioner operates the dealership facilities on weekday evenings until 9:00 p.m. for sales, and 1:00 a.m. for service. The dealership is also open on Saturdays until 5:00 p.m. for sales, and noon for service. A substantial portion of Petitioner's business is transacted during the weekday evenings and Saturdays. Petitioner has found that many of its customers prefer to shop during the evenings and weekends to avoid taking time off from their employment in order to purchase a family automobile.

Each Sunday there is a great amount of traffic on Highway M-58 in Saginaw Township because many of the businesses are open, and many potential

customers enter upon Petitioner's sales lot to view automobiles.

Many years ago society regarded Suday as a day of rest, however, consumer buying habits have since then changed dramatically, and Sunday is now an active day for both customers and merchants alike. A court could easily take judicial notice of this fact by observing the activity at any shopping mall in the State of Michigan on a Sunday/business day for most retail businesses.

ARGUMENT

There are several important reasons why this Court should review the validity of a Michigan legislative enactment singling out a lawful business and limiting its hours of operation when all other lawful business dealings in similar durable consumer goods are not limited in a similar fashion.

First, the law within the State of Michigan lacks uniformity both as to its application and as to its interpretation and as such is violative of Petitioner's right to equal protection and due process. Chapter

435 of the Michigan Compiled Laws originally included numerous provisions relating to Sunday "closings" and Sunday transactions. MCL 435.251 et. seq; MSA 9.2701 et seq; and provided for a comprehensive legislative scheme regarding Sunday "closings." By 1974 the State Legislature had repealed all Sunday closing laws except those dealing with the narrow business classification of car sales. Except for the narrow issue of car sales, citizens of the State of Michigan are allowed to exercise their right to contract by being permitted to carry on their businesses or vocations on Sunday without prohibition.

The Honorable ROBERT BOROS of the Circuit Court for the Kalamazoo County of, prior to the decision of the Michigan Court of Appeals, reversed the conviction of Dick Loehr Auto Super Mart for violation of the Sunday Closing Laws, holding MCL 435.251 et. seq. unconstitutional, "it being in violation of the equal protection clauses of the state and federal constitutions." (SEE APPENDIX G People of the State of Michigan v Richard Loehr d/b/a Dick Loehr's Auto Super Mart, File No. D823-00-675 AV.

An Attorney General Opinion of the State of Michigan regarding the

operation of state chartered banks and savings and loan operations, held that the Sunday Contracts and Sunday Observance Statutes 18.851 et. seq. had been totally repealed by 1974, and allowed for the operation of State chartered banks and savings and loan operations on Sundays and holidays OAG 1976, No. 4958, p. 453; OAG 1978 No. 5345, p. 565. (SEE APPENDIX F) The standard of review used by the Michigan Court of Appeals, in the case at hand, is in direct contravention of the standard of review adopted by the Michigan Supreme Court for these regulatory acts in Carolene v Thompson, 276 Mich

172 (1936). The Court in Carolene, supra, reviewed a state statute prohibiting the sale of milk products or their derivatives under a fictitious or trade name except when those products were used exclusively for the feeding of infants or young children and sold to be used under the order of physicians. In Carolene, supra, the Supreme Court looked to the purpose of the legislation and the classification. The Court at 178 held the legislation to be invalid, finding,

> "The Constitution guarantees to citizens the general right to engage in any business which does not harm the public,"

and that

> "police power of regulation does not include the absolute prohibition of trade in useful and harmless articles of commerce."

In the present case, the Michigan Supreme Court, in denying leave to appeal from the Court of Appeals, upholds this very type of prohibition. The Saginaw County Circuit Court, Michigan Court of Appeals, and Michigan Supreme Court refused to look to the purpose of the statute and the effect the repeal of all other acts constituting violations had on the purpose of the statute. The repeal resulted in a dimunition of the legislative purpose and as

such amounts to the prohibition. Petitioner's right to contract is thus impaired.

Second, the laws of the fifty states themselves would lack uniformity if the Michigan decision allowing the prohibition of Sunday Closing Laws when regulating the same or similar business is allowed to stand. This issue has been presented to both the Illinois and the Florida Supreme Courts with results disimilar to Michigan. The Illinois Supreme Court in Courtesy Motor Sales et al v Daniel P. Ward, States Attorney, et al 179 NE2d 692 reviewed a similar

statute prohibiting the sale of motor vehicles on Sunday. The Illinois Supreme Court in reviewing the classification of automobile dealers reviewed not only whether the separate classification of auto dealers was a denial of equal protection, but also reviewed the issue of whether auto dealers could be classified separately for the purpose of a Sunday closing law. Citing this Court's opinion in McGowen v Maryland, 366 US 420 81 S. Ct. 1101 6.L Ed2d 493, 410, the Illinois Supreme Court found this to be a case where a "general law can be made applicable," and held said

special law to be unconstitutional and invalid. The Court cited its own precedent in Eden v People 161 Ill. 296, 43NE 1108 which involved the validity of a statute prohibiting barbers from doing business on Sundays.

> "If the public welfare of the State demands that all businesses and all labor of every description, except works of necessity and charity should cease on Sunday, the first day of the week, and that day should be kept as a day of rest, the legislature has the power to enact a law requiring all persons to refrain from their ordinary callings on that day. (Coolys Const. Lim 725) All will then be placed on a perfect

> equality, and no one can complain of an unjust discrimination. But when the legislature under takes to single out one class of labor harmless in itself, and condemn that and that alone, it transcends its legitimate powers and its action cannot be sustained. Courtesy Motor Sales v Ward at 693."

The Florida Supreme Court in Moore v Thompson 126 S0.2d 543 (1960) also found a similar state statute unconstitutional, recognizing that while the Legislature may validly classify automobile dealers and pass laws regulating them, the power to regulate automobile dealers does not give the Legislature the power to prohibit activity when there is

no rational basis for the prohibition and classification.

Finally, the Michigan Supreme Court's denial of the leave to appeal and the Motion for Reconsideration has the effect of validating its ownstatute giving Petitioner constitutional grounds for appeal under 28 USC 1257(2).

For the above reasons, the case at hand is important to the jurisprudence of the State of Michigan, having significant impact on the commerce of the State of Michigan, the contractual rights of its citizens, and the regulation of one of the state's major industries.

Further, it is of significant constitutional importance as it affects the regulation of a significant aspect of commerce among the states.

Respectfully submitted,

Karen Jean Choate

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF SAGINAW)

I, KAREN JEAN CHOATE, hereby certify that on this 30th day of May, 1987, three copies of the Petition for Writ of Certiorari were mailed postage prepaid to CHRISTOPHER BOYD, Saginaw County Prosecutor, Saginaw County Governmental Center, 111 South Michigan, Saginaw, Michigan 48602, and three copies were mailed to FRANK J. KELLEY, Attorney General, State of Michigan, Law Building, 525 West Ottawa, Lansing, Michigan 48913. I further certify that all parties required to be served have been served.

Karen J. Choate

KAREN JEAN CHOATE
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Subscribed and sworn to before me this 30th day of May, 1987.

Evelyn S. Seman

Evelyn S. Seman, Notary Public
Saginaw County, State of Michigan
My Commission Expires: 7-30-90

APPENDIX A

OPINION

SAGINAW COUNTY CIRCUIT COURT

S T A T E O F M I C H I G A N

IN THE CIRCUIT COURT FOR THE

COUNTY OF SAGINAW

McDONALD PONTIAC
-CADILLAC, GMC,
INC., A MICHIGAN
CORPORATION,

Plaintiff,

NO. 83 12286 CE 4

vs

JOSEPH R. McDONALD
CIRCUIT COURT
JUDGE (P17371)

ROBERT L. KACZMAREK,
PROSECUTING ATTORNEY
OF THE COUNTY
OF SAGINAW,

Defendant.

_____/

OPINION OF THE COURT

This is a declaratory action challenging the constitutionality of 1953 PA66, ss. 1-4, effective May 12, 1953. Plaintiff,a new and used automobile dealer, seeks to enjoin enforcement of the statute.

The statute in question provides as follows:

Sec. 1. It shall be unlawful for any person, firm or corporation to engage in the business of buying, selling, trading or exchanging new, used or second-hand motor vehicles or offering to buy, sell, trade or exchange, or participate in the negotiation thereof, or attempt to buy, sell, trade or exchange any motor vehicle or interest therein, or of any written instrument pertaining thereto, on the first day of the week, commonly called Sunday.

Sec. 2. That it shall be unlawful for any person, firm or corporation to keep open their establishment or place of business on the first day of the week, commonly called Sunday, for any of the purposes mentioned in section 1 of this act: provided, however, that nothing in this act shall apply to any person who conscientiously believes that the seventh day of the week, from sunset Friday to sunset Saturday, should be observed as the Sabbath and who actually refrains from conducting or engaging in the business or buying, selling or offering for sale motor vehicles, or performing other secular business on that date.

Sec. 3. Any person, firm or corporation who violates or offends against the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by the laws of this state, or by the Court, in its discretion, suspending or revoking the dealer's license to do business within the state, or by fine and imprisonment and suspension and/or revocation, in the discretion of the court.

Sec. 4. This act shall not apply to counties having a population under 130,000 inhabitants according to the latest or each succeeding federal decennial census. MCL 435.251 et seq; MSA 9.2701 et seq.

Chapter 435 of the Michigan Compiled Laws, entitled "Sundays and Holidays" originally contained numerous provisions regulating Sunday transactions. MCL 435.251 et seq; MSA 9.20701 et seq. was part of this comprehensive legislative scheme which attempted to set aside a

day of rest and relaxation. The Legislature, by 1974, had repealed these so-called Sunday "blue laws" with the exception of those sections governing car sales. Accordingly, except for this one major exclusion, citizens of this State are now generally permitted to carry on their businesses or vocations on Sunday without prohibition.1

Plaintiff contends that the Act is an improper exercise of the police powers of the State and in violation of the due process and equal protection clauses of the federal and state constitutions.

The purpose of Sunday closing laws is to set apart Sunday as a day of rest.

Sunday has traditionally been observed as a day on which normal, nonessential, nonemergency activity of the business world ceases. Legislative bodies may properly act to preserve the custom and prohibit activities disruptive of the atmosphere of a day of rest. In acting to advance this objective, legislatures may classify trades, occupations, etc., so long as the classifications and/or differential application of the law is relevant to the State's objective. See McGowan v Maryland, 336 US 420; 81 S Ct 1107; 6 L Ed2d 393 (1961). Sunday Laws are most commonly challenged on their basis of classification of businesses.

Some courts have struck down these laws on the grounds that the distinctions lacked any rational relation to the purpose of a day of rest, either individually or in an agglomeration of inclusions or exclusions seen as collapsing of its own weight. Other courts have resisted such arguments deferring to legislative judgments of reasonableness. See 10 ALR 4th 246. The instant statute applies not to business activity generally, with reasonable exceptions, but only to the sale of motor vehicles. Moreover, as noted above, there is no longer any statutory policy in Michigan promoting Sunday, or any other day, as a day of rest. The

classification made by the Act, i.e., the selling of motor vehicles as distinguished from the doing of other kinds of business, therefore, has no rational connection and is wholly irrelevant to preserving a day of rest. The Act, to withstand constitutional challenge, must find a sufficient basis elsewhere.

Many reasons have been advanced to justify the prohibition of Sunday auto sales. Among them are the difficulty if not impossibility of ascertaining the status of title and liens; of obtaining required insurance coverage and necessary financing; of securing mechanical services and the attendant danger of

driving mechanically defective autos; and the increased burden upon under-staffed police agencies due to potential auto thefts. Those jurisdictions which have addressed the identical issue before this Court have come to different conclusions, either declaring such provisions to be within the police power of the state and constitutional, or holding the provisions to be discriminatory and an unreasonable exercise of the legislative power. See Diamond Auto Sales, Inc., v Erbe, 251 Iowa 1330; 105 NW2d 650 (1960): Dodge Town, Inc. v Romney, 25 Utah 2d 267; 480 P2d 461 (1971); Moore v Thompson, 126 SO2d 543 (Fla., 1960).

It is a well settled principle that regularly enacted laws are presumed to be constitutional and if any reasonable state of facts can be conceived which will support the validity of the law, it is the Court's duty to sustain it. When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the Courts but for the legislature. Courts should not inquire into the motives of the legislators in passing legislation nor should it determine which scientific view is correct when ruling upon whether the police power has been properly exercised.

The Court, having reviewed the relevant case law, cannot say that the Legislature, by enacting the challenged Act or by its failure to repeal it along with the other provisions governing Sunday transactions, had no reasonable basis for concluding that the above enumerated evils exist and that the public should be protected from them.

Plaintiff is correct that many of the ostensible evils sought to be remedies by the instant legislation: fraud or mistake, auto theft, etc., also exist on weeknights and Saturdays, but auto sales are not prohibited at those times. This,

however, ignores basic economic factors which the Legislature may have considered at the time of the statute's enactment or subsequently when no attempt was made to repeal the provisions. The purchase of an automobile, whether new or used, can consume a great deal of time and effort. We need not outline here the steps taken by a typical buyer in purchasing an auto. Suffice it to say that from the initial decision to purchase to the actual consummation of a deal, many days, weeks or months may pass. Individuals or couples, because of their employment and/or family commitments, may not always have

the time to adequately investigate such an important purchase during a normal 9-5 business day. Many auto dealers recognize this and remain open after normal business hours and/or on Saturday to accommodate potential buyers. The Legislature may well have recognized these business factors and concluded that although the above mentioned evils exist at times and days other than a Sunday, it was in the best interests of the public to correct the existing evil so far as possible without unduly affecting business interests or the interests of the buying public. Further, while it is true that the Legislature could

have taken a less restrictive approach, the fact that a law may be harsh or even unwise does not render it unconstitutional or justify judicial interference with legislative enactments.

Plaintiff's equal protection claim is likewise without merit. Plaintiff argues that the Act creates a special class of merchants prohibiting the same from selling their wares on a Sunday while at the same time permitting other forms of business to engage in sales, regardless of dangerous effect of these products on the public and with no concern with any public purpose

such as creating a day of rest. Equal protection does not require that all laws apply equally alike to all citizens of the state. It is sufficient that the statute apply equally to all members of a class provided the classification is not purely arbitrary and rests upon some reasonable basis. Legislatures have wide discretion in determining the classes to which its acts shall apply. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See McGowan v Maryland, supra. There can be little doubt that automobile dealers may be specifically classified for the purpose of legislatio

The automobiles use, operation, sale, licensure, registration insurance, theft and other related matters have frequently received special attention. For the reasons set forth earlier, there is clearly sufficient basis for classifying Sunday auto sales separately from Sunday sales of furniture, clothes, groceries, cigarettes, pets, liquor, guns, etc. Further, the statute need not prohibit every Sunday sale that is detrimental to the public morals, health, safety or welfare in order to withstand an equal protection challenge.

Plaintiff correctly points out that the contested provision does

not prohibit Sunday sales of aircraft, boats, snowmobiles and other recreational vehicles or the private sale of automobiles. It is argued that such unequal treatment is not justified by the aim and purpose of the statute. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated. The Courts, however, recognize the very real difficulties under which legislatures operate and

refuse to strike down indiscriminately all legislation embodying some classificatory inequality. It is not necessary, for equal protection purposes, that the legislature deal with every possible protection purposes, that the legislature may attack a general problem in a piecemeal fashion. In the instant case the Legislature may well have concluded that the Sunday sale of boats, airplanes, and other recreational vehicles do not present the same type or degree of problem as that presented by auto-dealer sales; or, as in the case of the isolated private sale of an auto, that,

as a practical matter, it would be difficult to effectively enforce the prohibition of such sales. This Court cannot say that these judgments are not allowable.

In summary, this Court finds no constitutional impediment to the statute's enforcement. While the statute is not in every respect logically consistent with its aims, it is enough that there is an evil at hand for correction and that the measure is a rational way to correct it. Nor can this Court say that the legislative classification is unreasonable or arbitrary, having no fair relation to a proper objective.

Plaintiffs petition for declaratory relief is denied.

An Order may follow.

Dated: December 5, 1984

s/Joseph R. McDonald
JOSEPH R. McDONALD,
CIRCUIT JUDGE

1. State chartered banks and savings and loan associations may even operate on Sundays and holidays. OAG 1976, No. 4958, p 453; OAG 1978, No. 5345, p 565.

APPENDIX B

OPINION

MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN
COURT OF APPEALS

McDONALD PONTIAC-
CADILLAC-GMC, INC.,
A Michigan Corporation,

Plaintiff-Appellant,

v Docket No. 82220

PROSECUTING ATTORNEY
FOR THE COUNTY OF
SAGINAW,

Defendant-Appellee.

PER CURIAM

Plaintiff appeals by right from the December 5, 1984, order of the Saginaw County Circuit Court which denied Plaintiff's request for declaratory relief from MCL 435.151; MSA 9.2701, which prohibits the

sale of automobiles on Sunday.

Plaintiff is an automobile dealership selling new and used automobiles, located on M-58 in Saginaw Township. Plaintiff has been operating this business since September 25, 1980, and employs over 125 people. Plaintiff claimed that other merchants located near plaintiff's business, including motor home and motorcycle dealers, are allowed to sell their products on Sunday, while he was prohibited by statute.

On March 14, 1983, plaintiff filed a complaint seeking a judgment declaring MCL 435.251; MSA 9.2701 unconstitutional and refused to strike it down. On appeal, plaintiff challenges the court's ruling.

The defendant does not address the constitutional issue. Rather, defendant, as the prosecutor, asserts that the law must be enforced as it now stands.

Preserving the separate functions of the executive, legislature, and judiciary is fundamental to our system of government, and is embodied in the Michigan constitution at Const 1963, art 3, sec. 2. It is a well established rule of law that, absent a constitutional infrindgement, the judiciary may not inquire into the reasonableness of the policy the legislature pursues in enacting a statute. Albert v Gibson,

141 Mich 698, 105 NW 19 (1905). Nor may the courts inquire into the knowledge, motives, or methods of the legislature in passing legislation. C F Smith Co v Fitzgerald, 270 Mich 659; 259 NW2d 352 (1935), app dis 296 US 659; 56 S Ct 115; 80 L Ed 470 (1935). Therefore, if plaintiff uses "reasonableness" to connote the wisdom or propriety of a statute, the trial court was correct in refusing to consider the reasonableness of the statute.

The courts may determine the "reasonableness" of legislative action only when it impinges upon a constitutional right. In that case, the courts have a duty to determine

whether a statute is valid or void as unconstitutional right. In that case, the courts have a duty to determine whether a statute is valid or void as unconstitutional by analyzing whether the legislative act bears a reasonable relationship to a legitimate legislative purpose. Carolene Products Co v Thompson, 276 Mich 172; 267 NW 608 (1936).

Count I of plaintiff's complaint alleges unconstitutionality by stating:

"6. That there is no reasonable relationship between the remedy of prohibiting the sale of automobiles on Sunday and any alleged public purpose to be served by said Statute.

"7. That said Statute is an invalid use of police power, for the reason that said Statute does not promote

the public health, safety or welfare."

This requested the trial court to delve into the propriety of the Sunday closing law, which the court correctly refused to do.

Count II of plaintiff's complaint alleged a violation of equal protection and due process, and the trial court addressed the issue of whether classifying auto dealers separately from other merchants bore a reasonable relationship to the underlying purpose of the Sunday closing law. It found the classification not wholly arbitrary or unreasonable and, therefore, valid.

In summary, courts may determine the reasonableness of the relationship

between a statute and the legislative purpose behind it when its constitutionality is challenged, but may not determine the reasonableness of the legislature's purpose.

Plaintiff asserts that MCL 435.251; MSA 9.2701 is an invalid exercise of police power because it is not rationally related to any purpose. Plaintiff also contends that it is a violation of equal protection and unconstitutionally vague. Since this legislation affects only plaintiff's economic interest, a mere rational relationship to a legitimate legislative purpose is required to find the statute constitutional.

See Michigan State Employees Assn v MESC, 94 Mich App 677; 290 NW2d 729 (1980). It is undisputed that the state has the power to regulate for the health, safety, and welfare of the public. Const 1963, art 4, sec. 51.

The statute, along with its preamble, states:

"CAR SALES

"P.A. 1953, No. 66, Imd. Eff. May 12

"AN ACT to prohibit the opening of any retail or wholesale new and used care business on the first day of the week, commonly called Sunday, for the purpose of carrying on or engaging in the business of offering to buy, sell, exchange, trade or participate in the negotiation thereof of any type or kind of automobile, on the first day of the week, commonly called Sunday.

"435.251 Motor vehicles; sale on Sunday unlawful; exception

"Sec. 1. It shall be unlawful for any person, firm or corporation to engage in the business of buying, selling, trading or exchanging new, used or second-hand motor vehicles or offering to buy, sell, trade or exchange, or participate in the negotiation thereof, or attempt to buy, sell, trade or exchange any motor vehicle of interest therein, or of any written instrument pertaining thereto, on the first day of the week, commonly called Sunday."

The goal of the legislature in enacting MCL 435.251; MSA 9.2701 is not revealed in the statue's preamble. Plaintiff alleges that the purpose could not be to set aside Sunday as a day of rest because the legislature has repealed other Sunday

statutes. However, the legislature may have intended that goal, and to inquire as to why it has not repealed MCL 435.251; MSA 9.2701 when it has repealed other Sunday statutes is to improperly inquire into the legislature's motives.

Further purposes of MCL 435.251; MSA 9.2701 were suggested by the trial court in its opinion: difficulty of ascertaining title and existence of liens, inability to obtain insurance and financing or secure mechanical services (with a greater possibility of driving defective automobiles), and the greater burden on police agencies due to potential auto theft. All of these may constitute purposes of the

statute to which being closed on Sunday reasonably relates.

The appropriate Michigan law for review of this matter is as follows: "Legislation challenged on a constitutional basis is 'clothed in a presumption of constitutionality.'" Johnson v Harnishfeger Corp, 414 Mich 102, 113; 323 NW2d 912 (1982); Shavers v Attorney General, 402 Mich 554, 612; 267 NW2d 72 (1978). "(E)very reasonable presumption . . . must be indulged in favor of (a statute's) constitutionality." Rohan v Detroit Racing Comm, 314 Mich 326, 341; 22 NW2d 433 (1946). It is the court's duty to construe the statute as constitutional unless the contrary clearly appears. People v

McLeod, 407 Mich 632, 657; 288 NW2d 909 (1980); Rohan, supra.

The burden is on the individual challenging the statutory classification to show that the classification is without reasonable justification or basis. Eastway v Elsenga, 420 Mich 410, 420; 362 NW2d 684 (1984), reh den 421 Mich 1202 (1985); Manistee Bank and Trust Co v McGowen, 394 Mich 655; 232 NW2d 636 (1975). The objector must show that the classification is arbitrary. Johnson v Harnischfeger Corp, supra 113.

"The test to determine whether legislation enacted pursuant to the police power comports with due process, is whether the legislation bears a reasonable relation to a permissible legislative objective." Shavers, supra 612.

The test for an equal protection determination is "essentially the same." Id, 613.

If "neither a suspect class nor a fundamental right is involve in the (legislative) classification, it will be upheld in the face of an equal protection challenge . . . if it rationally furthers the object of the legislation." People v McLeod, 407 Mich 632, 663; 288 NW2d 909 (1980). In dealing with socialeconomic legislation, if there is no discernable fundamental right at stake or if a particular protected class is not affected by the classification, the test is whether the challenged

legislative classification is rationally related to a legitimate state interest. Michigan State Employees Assn v MESC, 94 Mich App 677; 290 NW2d 729 (1980). Under (the) traditional equal protection analysis, if the classification is rationally related to a legitimate governmental interest, the legislative classification must be sustained. Shavers, supra 413. "A party attacking a statutory classification on equal protection grounds has the heavy burden of demonstrating that the classification loses a reasonable basis." Forrest v Parmalee, 402 Mich 348, 356; 262

NW2d 653 (1978); Manistee Bank and Trust Co, supra 668.

"(I)n the face of a due process or equal protection challenge 'where legislative judgment is drawn in question' a court's inquiry must be restricted to the issue of whether any state of facts either known or which can reasonably be assumed affords support for it.'" Shavers, supra 613-614.

See also Eastway v Eisenga, supra 420; Manistee, supra 668. McAvoy v HB Sherman Co, 401 Mich 419, 453-54; 258 NW2d 414 (1977).

We point out that '(T)he Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all.'" Manistee Bank, supra at 672. The appellate courts "do not sit 'as a superlegislature to judge the wisdom or desirability of legislative policy determinations. We sit as a court to determine whether there is a rational basis for the legislature's judgment. If there is, then that judgment must be sustained . . . .'" O'Donnell v State Farm Ins, 404 Mich 524,

543; 372 NW2d 829 (1979) app dism 444 US 803 (1979).

Although the legislature has repealed most other "Sunday" laws, the legislature is not required "to deal with every aspect of a problem at the same time." O'Donnell, supra at 543. Under the constitutional tests as outlined above, we find that the classification in question neither violates due process nor equal protection guarantees. The classification, while it may appear harsh to automobile dealers, affects all members of that class equally and is not arbitrary as it stands. We cannot say that the government's interest in regulating automobile sales on Sundays has no rational basis and we are not going to be tempted to open the flood gates to declare all regulatory legislation of Sunday sales unconstitutional.

We, as did the court below, find no constitutional impediment to the effects of the statute, nor do we find it unreasonable or arbitrary.

Affirmed.

/s/ Robert J. Danhof
/s/ Vincent J. Brennan
/s/ John Gillis, Jr.

BEFORE: R. J. Danhof, C. J., and

V. J. Brennan and J. Gillis, Jr.,* JJ.

---

*Circuit judge sitting on the Court of Appeals by assignment.

APPENDIX C

MICHIGAN SUPREME COURT
DENIAL OF LEAVE TO APPEAL

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 22nd day of October in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

78418

McDONALD PONTIAC-CADILLAC-GMC, INC., a Michigan Corporation,

Plaintiff-Appellant,

v

PROSECUTING ATTORNEY FOR THE COUNTY OF SAGINAW,

Defendant-Appellee.

SC: 78418
CoA: 82220
LC: 83-12286-CE-4

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN-ss.

I, CORIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct coipy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

S/ Jacqueline B. McKinnon , Clerk.
Deputy

APPENDIX D

MICHIGAN SUPREME COURT
DENIAL OF MOTION FOR RECONSIDERATION

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 1st day of April in the year of our Lord one thousand nine hundred and eighty-seven.

78418(31)

Present the Honorable
DOROTHY COMSTOCK RILEY,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

McDONALD PONTIAC-CADILLAC-GMC, INC., a Michigan corporation,

Plaintiff-Appellant,

v

PROSECUTING ATTORNEY FOR THE COUNTY OF SAGINAW,

Defendant- Appellee

SC: 78418
COA: 82220
LC: 83-12286-CE-4

On order of the Court, the delayed motion for reconsideration of this Court's order of October 22, 1986 is considered, and it is DENIED, because the motion was filed more than 21 days after the date the order was certified. MCR 7.313(E).

STATE OF MICHIGAN - ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of April in the year of our Lord one thousand nine hundred and eighty-seven.

S/ CORBIN R. DAVIS Clerk.

APPENDIX E

AFFIDAVIT OF TIMELY FILING

AFFIDAVIT OF TIMELY FILING

STATE OF MICHIGAN)
) ss.
County of Saginaw)

COMES NOW, THOMAS WARREN McDONALD, JR., Attorney for Petitioner, and being duly sworn deposes and states:

1. That a Motion for Reconsideration pursuant to MCR 7.313(E) was filed with the Michigan Supreme Court in a timely fashion/ To this purpose the Affidavit of Service concerning that motion is attached hereto and incorporated herein by reference.

2. That December 30, 1986 was the date scheduled for reconsideration of the denial of a leave to appeal by the Michigan Supreme Court from its order of October 22, 1986.

3. Briefs were filed and accepted by the Clerk of the Michigan Supreme Court from both Appellant and Appellee.

4. Attorney for Petitioner in good faith believed said motion to be timely filed and accepted.

5. Attorney for Petitioner was not aware that said motion was not accepted as timely filed until April 2, 1987 when he received a decision from the Michigan Supreme Court denying the motion for lack of timely filing.

6. The delayed response by the Michigan Supreme Court caused delay in filing a Petition for Writ of Certiorari in this matter. Attorney for Petitioner has filed from the date of denial of the motion rather than from that date of the denial of leave to appeal because of delayed notification of acceptance.

Further, Deponent sayeth not.

THOMAS WARREN McDONALD, JR.

Subscribed and sworn to before me this 27th day of May, 1987.

Evelyn S. Seman, Notary Public
Saginaw county, Michigan
My Commission Expires: 7/30/90

STATE OF MICHIGAN

IN THE SUPREME COURT

McDONALD PONTIAC-CADILLAC-GMC, INC., a Michigan corporation,

Plaintiff-Appellant,

v

ROBERT L. KACZMAREK, PROSECUTING ATTORNEY FOR THE COUNTY OF SAGINAW,

Defendant-Appellee

/

Supreme Court No. 78418

Court of Appeals No. 82220

Lower Court No. 83-12286-CE-4

McDONALD & McCOY, P.C.
BY: THOMAS W. McDONALD, JR. (P32464)
Attorneys for Plaintiff-Appellant
3126 Davenport Street
Saginaw, Michigan 48602
Tel. No. (517) 792-7811

MARK J. GAERTNER (P33733)
Assistant Prosecuting Attorney
Attorney for Defendant-Appellee

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss.
County of Saginaw)

THOMAS W. McDONALD, JR. being duly sworn, dstates that on the 11th day of November, 1986, he mailed a copy of MOTION FOR RECONSIDERATION and NOTICE OF HEARING to:

MARK J. GAERTNER
Assistant Prosecuting Attorney
Attorney for Defendant-Appellee
Courthouse
Saginaw, michigan 48602

FRANK J. KELLEY
Attorney General
Law building
525 W. Ottawa
Lansing, Michigan 48913

by placing a copy of said MOTION FOR RECONSIDERATION and NOTICE OF HEARING in envelopes addressed to each of said parties, with sufficient first class postage prepaid thereon, and deposited same in a United States mail receptacle in the City of Saginaw, Michigan.

S/Thomas W. McDonald, Jr.
THOMAS W. McDONALD, JR.

Subscribed and sworn to before me on this 11th day of November, 1986.

S/ Evelyn S. Seman
Evelyn S. Seman, Notary Public
Saginaw County, Michigan
My Commission Expires: 7/30/90

APPENDIX F

MICHIGAN ATTORNEY GENERAL OPINION

No. 4958

REPORT OF THE ATTORNEY GENERAL

BANKS AND BANKING: Banking Hours

SAVINGS AND LOAN ASSOCIATIONS:
Hours of Operation

A bank or savings and loan association may operate on Sundays if its bylaws are appropriately amended. A bank or savings and loan association, under certain conditions, may open some of its offices on Sunday while others remain closed.

A bank or savings and loan association may establish its own hours of Sunday operation providing such hours are reasonable and public notice is given. A bank or savings and loan association, under certain conditions, may close on a secular day, other than Saturday.

Opinion No. 4958 May 12, 1976.

Russell S. Kropschot
Chief Deputy Commissioner
Financial Institutions Bureau
Department of Commerce
Law Building
Lansing, Michigan

You have asked me the following questions regarding banks and savings and loan associations:

1. May a bank or savings and loan association legally open for busines on Sundays?

a. Assuming the legality of Sun opening, must the Board of Directors the bank or savings and loan associa adopt a formal resolution and/or by- amendment?

b. If a bank or savings and loa association opens for business on Sundays, must all of its branches al be open?

c. Is there any limitation as t the number of hours that a bank or savings and loan association may be open for business on Sundays?

2. Are banks and savings and loan associations required by law to be o for business on all secular days?

Banks and savings and loan associations have historically close on Sunday because of the Sunday Observance and Sunday Contracts Statu 1846 RS 43, MCLA 435.1 et seq: MSA 18.851 et seq, rep. 1962 PA 127. The statutes had the effect of prohibiting all business activity on Sunday, except works of charity or necessity, and rendering absolutely void any contract entered into on Sun

Although modified through the years the act was not totally repealed until 1974. See 1974 PA 171. In conjunction with the aforementioned statutes, the Legislature enacted the Legal Holiday Statute, 1865 PA 124, as amended by 1974 PA 9. MCLA 435.101; MSA 18.861, which designates certain days as holidays and declares that these days be treated as Sundays. Although the original effect of prohibiting business on such holidays has been rendered nugatory, the act provides:

> "The following days namely . . . for all purposes whatever as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes . . shall be treated and considered as the first day of the week, commonly called Sunday . . . all bills, checks, and notes otherwise presentable for acceptance of (sic) payment on any of the days shall be deemed to be payable and presentable for acceptance or payment on the next secular or business day . . "

This provision affecting the payment and presentment of negotiable instruments falling due on Sundays and holidays, was necessary to protect banks and savings

and loan associations from liability for the wrongful dishonor of such instruments and also the holders of such instruments for failure to make presentment on a designated date. This protection has been expanded by Section 3503(3) of the Uniform Commercial Code, 1962 PA 174, section 3503(3), MCLA 440.3503(3); MSA 19.3503(3), which provides:

> "Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties."

Examination of the Michigan Banking Code, 1969 PA 319, MCLA 487.301 et seq; MSA 23.710(1) et seq, and of the Savings and Loan Association Act, 1964 PA 156, MCLA 489.501 et seq; MSA 23.540(101) et seq. discloses that neither act contains a provision dealing with hours or days of operation. Several leading treaties on the subject conclude that banks, like other forms of business, may establish any reasonable hours for the transaction of their business. See 5 Zollman, Banks & Banking, Section 2691, p 16; 4 Mitchee, Banks & Banking, Section 6, p 14.

Inasmuch as the Legislature has not limited the days or hours during which financial institutions may open for business, the answer to your first question is that banks and savings and loan associations, like other forms of business, may operate on Sundays. However, it must be recognized that there is a close relationship between the safe and sound operation of these institutions and the economic welfare of the citizens of this State. The unlimited and uncontrolled operations of banks and savings and loan associations with respect to hours of operation may adversely affect smaller independent banks and savings and loan associations which are unable to compete. This problem should be closely examined by the Financial Institutions Bureau as well as the Legislature to determine if remedial action is necessary.

With regard to your second question, Section 151(6) of the Banking Code, 1969 PA 319, Section 151(6), MCLA 487.451(6); MSA 23.710(151)(6), provides that a bank shall have the power:

> "To make, alter, amend and repeal bylaws not inconsistent with its articles or with law for the administration and regulation of the affairs of the bank."

Similarly, Section 205 of the Savings & Loan Association Act, 1964 PA 156, Section 205, MCLA 489.605; MSA 23.540(205), provides that a savings and loan association shall adopt bylaws for the regulation and management of its business. Since opening on Sunday would be a significant change in the normal and traditional operation of the affairs of such institutions, it would be my opinion that before a bank or savings and loan association open for business on a Sunday, its bylaws must be appropriately amended.

In response to your third question, I refer to OAG 1969-1970, No. 4659, p 14 (January 13, 1969), which dealt with the question of whether a bank was obligated to open its main office on any day on which any of its branches were open. That opinion analyzed the question with respect to two considerations:

> ". . . first as to what liability the bank may incur if it is not open for the purpose of presenting for payment or acceptance and the protesting and giving notice of dishonor of bills of exchange, bank checks and promissory notes; and second, the safety and convenience of the public." p 14

The opinion concluded that based on Section 4106 of the Uniform Commercial Code, 1962 PA 174, Section 4106, MCLA 440.4106; MSA 19.4106, which designates each bank branch as a separate bank for the purposes of articles 3 and 4 of the Uniform Commercial Code, 1962 PA 174, supra, a bank could properly open some of its brancheson Saturday and not its main office providing adequate precautions against unsafe and unsound banking practices are taken and the bank makes available its central bookkeeping department for information purposes whenever any branch is open. Similarly, I would conclude that a bank or savings and loan association could open any or all of its offices on Sunday providing similar conditions are met.

In response to your fourth question, I find no statutes or cases which control the number of hours a financial institution must remain open. In the absence of such, it is my opinion that each institution may establish its own hours of Sunday operation providing such hours are reasonable and public notice is given.

In answer to your final question concerning whether banks and savings and loan associations may voluntarily close on secular days, other than Saturday, I again note that there are no Michigan

statutes dealing with the days such financial institutions must remain open for business. Again, the answer depends on what possible liability a bank may incur for failure to honor the presentment of a negotiable instrument and the protesting and giving notice of dishonor of bills of exchange, bank clerks and promissory notes and also on the effect such closing may have on the safety and convenience of the public.

Under the Uniform Commercial Code, the failure to make timely presentment or to give notice of dishonor of a negotiable instrument may result in the discharge of all endorsers and the drawer of an instrument. See 1962 PA 174, Section 3502, MCLA 440.3502; MSA 19.3502. In addition, the wrongful dishonor of an instrument by a bank will render the bank liable to its customer for any damages incurred therefrom. See 1962 PA 174, Section 4402, MCLA 440.4402; MSA 19.4402. However, as I have previously pointed out, Section 3503(3) of the Code, supra, provides that any presentment due on a day which is not a full business day shall be deemed due on the succeeding business day. Similarly, with respect to giving notice of dishonor, the Uniform Commercial Code computes the time requirement of a bank

based on the days which the bank is open to the public. See 1962 PA 174, Sections 3508(2), 4104(1)(h), 4104(1)(c); MCLA 440.3508(2), 440.4104(1)(h), 449.4104(1)(c): MSA 19.3508(2), 19.4104(1)(h), 19.4104(1)(c).

The public has a right to expect that banks and savings and loan associations with which they do business will be open at reasonable hours for the transaction of necessary business. The courts have recognized that banks and other financial institutions are charged with a public trust which makes their regulation and operation unique. See Commissioner of Banking v Berry, 27 Mich App 271. 306: 183 NW2d 436, 452 (1970). At 1 OAG 1955-1956, No 2285, p 763 (December 22, 1955), the Attorney General determined that the reasonable hours for the conduct of the business of a bank may vary between communities. In deciding that banks may close on the afternoons of secular days, the opinion held:

> ". . . Therefore I believe that there are two circumstances under which a bank may close after 12 o'clock noon on other secular days than Saturdays without incurring the possibility of liability: first, in the situation where a bank is located in a community in which

it is established banking custom for a bank to so close; and second, in the situation where it is custom of banks to remain open during such periods, a bank may safely close by specifically contracting with its depositors that it may so close and, in addition, giving reasonable public notice of the fact." p 767

In a related opinion, OAG 1947-1948, No 716, p 611 (March 31, 1948), the Attorney General ruled that in the absence of any prohibitory language, a bank could voluntarily close and suspend their banking activities during Saturdays. Therefore, in answer to your final question, it is my opinion that a bank or savings and loan association may close on a secular day, other than Saturday providing: (1) appropriate bylaw amendments are made; (2) the institution specifically contract with its depositors to close; (3) reasonable public notice is given; (4) the institution maintains reasonable hours and days of operation in order that the public may be able to transact necessary business; and (5) if the institution closes some of its offices, but keeps others open, notice of which office are open must be

conspicuously displayed in order that any necessary presentment or notices may be made with regard to negotiable instruments.

FRANK J. KELLEY,
Attorney General.

APPENDIX G

OPINION

KALAMAZOO CIRCUIT COURT

STATE OF MICHIGAN
COUNTY OF SAGINAW

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

vs.

RICHARD LOEHR d/b/a
DICK LOEHR AUTO
SUPER MART,

Defendant-Appellant,

File No.
D 823-00-675 AV

Formerly District
Court File No.
S82-141-DI

THE KALAMAZOO BRANCH
OF THE AMERICAN
CIVIL LIBERTIES
UNION,

Amicus Curiae,

DETROIT AUTOMOBILE
DEALERS'
ASSOCIATION,

Amicus Curiae. /

ORDER REVERSING
CONVICTION

JAMES J. GREGART (P14352)
Attorney for
Defendant-Appellee

DAVID D. CORNELL (P12233)
Attorney for
Defendant-Appellant

LAURENCE T. WELCH (P30699)
Attorney for
Amicus Curiae

FREDERICK COLOMBO (P12083)
LAWRENCE F. RANISZESKI (P23939)
Attorneys for Amicus Curiae

At a session of said Court held in the City and County of Kalamazoo, State of Michigan, on the 31st day of March, 1983.

PRESENT: HONORABLE ROBERT L. BORSOS, Circuit Judge

In this case, Defendant-Appellant having been convicted by the Eighty District Court, the Honorable Kenneth Long, on Septembe 7, 1982, and thereafter having perfected his appeal and the Court having had the opportunity of reviewing the briefs of the People of the State of Michigan, the Kalamazoo Branch of the American Civil Liberties Union and the Detroit Automobile Dealers Association, and having heard the oral arguments of Plaintiff-Appellee, the People of the State of Michigan, and Defendant-Appellant, RICHARD LOEHR, by their respective attorneys of record, and due consideration having been had by the Court,

IT IS HEREBY ORDERED that the conviction of the Defendant-Appealant be reversed and the charges dismissed, it being the specific finding of this Court that the statute under which the Defendant-Appellant was convicted, namely, MCLA s435.251, et seq, is

unconstitutional, it being in violation of the equal protection clauses of the state and federal constitutions.

/s/ Robert L. Borsos
Hon. Robert L. Borsos
Circuit Judge

APPROVED:

/s/ Mark V. Courtade
Mark V. Courtade
Assistant Prosecutor

/s/ David D. Cornell
David D. Cornell
Attorney for Defendant-Appellant

Supreme Court, U.S.
FILED
JUN 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

No: 86-1920

McDONALD PONTIAC-CADILLAC-GMC, INC.
A Michigan Corporation,

Petitioner

v

PROSECUTING ATTORNEY
FOR THE COUNTY OF SAGINAW

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OF RECORD:

CHRISTOPHER S. BOYD
PROSECUTING ATTORNEY

ANNETTE M. GRAY
Assistant Prosecuting Attorney
Chief of Appeals
Courthouse
Saginaw, Michigan 48602
(517) 790-5330

Counsel for Respondent

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Respondent accepts Petitioner's delineation of the questions presented, but notes that Petitioner's Questions 4 and 5 were not previously raised or addressed by the Michigan courts below.

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Respondent, the Saginaw County, Michigan Prosecuting Attorney, respectfully requests that this Honorable Court deny this Petition for Writ of Certiorari, which seeks review of the Michigan Court of Appeals' March 18, 1986 Opinion affirming the constitutionality of MCLA 435.251 et seq;MSA 9.2701 et seq, (McDONALD V SAGINAW PROSECUTOR, 150 Mich App 52; 388 NW 2d 301 (1986)), the Michigan Supreme Court's October 22, 1986 denial of leave to appeal said Opinion (McDONALD V SAGINAW PROSECUTOR, 426 Mich 866 (1986)), and the Michigan Supreme Court's April 1, 1987 denial of motion for reconsideration of denial of leave (unreported).

OPINION BELOW

Respondent accepts Petitioner's recitation of the Opinions Below as correct.

JURISDICTION

Respondent accepts Petitioner's recitation of jurisdictional provisions as correct, but makes procedural and jurisdictional bar arguments in the argument portion of this Brief.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Respondent accepts Petitioner's recitation of the Michigan Statute involved with the addition of Michigan Court Rule 7.313(D)(1), which provides as follows:

> Rule 7.313 MOTIONS IN SUPREME COURT
>
> * * *
>
> (D) Motion for Rehearing.
>
> (1) To move for rehearing, a party must file within 21 days after the opinion was filed (the date of an opinion is stamped on the upper right corner of the first page):
>
> (a) 24 printed copies of a motion, if the opinion decided a case placed on a session calendar; or
>
> (b) 14 typewritten copies of a motion, if the opinion decided a noncalendar case; and
>
> (c) proof that a copy was served on the parties.
>
> The motion for rehearing must include reasons why the court should modify its opinion.

COUNTERSTATEMENT OF THE CASE

Petitioner never argued infringement of the right to contract and violation of the Commerce Clause in its pleadings below. Accordingly, Michigan's Tenth Judicial Circuit Court, Michigan's Court of Appeals, and Michigan's Supreme Court were not presented with and did not decide those issues.

The Michigan Court of Appeals' Opinion cites no United States Constitutional Provision or United States Supreme Court precedent.

Petitioner's Motion for Reconsideration in the Michigan Supreme Court was not timely filed within 21 days of the Michigan Supreme Court's October 22, 1986 denial of leave to appeal. MCR 7.313(D)(1). That Motion for Reconsideration should have been filed no

later than November 12, 1986 in order to be timely. However, it was not filed until November 14, 1986, a fact of which this Honorable Court may take judicial notice. FRE 201(2).

Petitioner's Statement of the Case mislabels (i.e. reverses) Petitioner's Appendices F and G. The correct labeling is that Appendix F is Michigan Attorney General's Opinion 4958, and Appendix G is the Kalamazoo County Circuit Court Opinion in PEOPLE V RICHARD LOEHR d/ba DICK LOEHR'S AUTO SUPER MART File No. D 82300675 AV.

Moreover, Petitioner's Appendix G (the LOEHR Opinion) is mistakenly entitled "County of Saginaw", when it should be entitled "County of Kalamazoo."

Petitioner's Appendix G has no precedential effect in Michigan.

ARGUMENT

Petitioner's request for a Writ of Certiorari presents no substantial federal question. An appeal concerning a similar Illinois statute was dismissed by this Honorable Court for want of a substantial federal question in FIRESIDE CHRYSLER-PLYMOUTH, MAZDA INC. et al, v JIM EDGAR, SECRETARY OF STATE, et al ___Ill 2d ___; 464 NE2d 275 (1984) 469 US 926; 83 L Ed 2d 254; 105 S Ct 316 (1984). The same result should obtain in this case.

In FIRESIDE CHRYSLER-PLYMOUTH, MAZDA INC. et al v EDGAR, supra, the Supreme Court of Illinois upheld a statute similar to the one at issue here. Thus, it is clear that Petitioner misrepresents the law of Illinois at pages 24-27 of its Petition, where COURTESY MOTOR SALES et al v DANIEL P. WARD, STATES ATTORNEY et al 33

Ill App 2d 499; 179 NW2d 692 (1962) is discussed.

Defendant challenges the statute at issue as being a Sunday closing law. However, it is notable that said statute is embodied within Michigan's Motor Vehicle Code, thus indicating a purpose beyond that of a mere Sunday closing law. See generally Petitioner's Appendix B, pages B9 - B11.

Assuming arguendo that the legislation at issue is merely a Sunday closing law, it is notable that this Honorable Court has specifically upheld the validity of Sunday closing laws against a variety of constitutional challenges. See the unanimous opinion in McGOWAN V STATE OF MARYLAND, 366 US 460; 81 S Ct 1153; 6 L Ed 2d 393 (1961) (due process, equal protection, first

amendment/religion). TWO GUYS FROM HARRISON V McGINLEY, 366 US 582; 81 S Ct 1135; 6 L Ed 2d 551 (1961) (equal protection and due process -- stating, "...the legislature may select one phase of one field and apply a remedy there, neglecting the others." 366 US at 592). GALLAGHER V CROWN KOSHER SUPER MARKET, 366 US 617; 81 S Ct 1122; 6 L Ed 2d 536 (1961) (equal protection and first amendment/religion).

Likewise, at least one federal district court has upheld a state Sunday Closing Law. In HAMES MOBILE HOMES v SELLERS, 343 F Supp 12 (1972 N.D. Iowa), a federal district court upheld an Iowa Sunday closing law prohibiting the sale of motor vehicles. On federal grounds, it was specifically held that the statutory classification was not invidious and that

there was a rational basis. The reasons advanced in support of the rational basis finding included: hazards to the public due to the lack of mechanics on Sunday, the lack of law enforcement officers for checking dealers lots, the difficulty in obtaining necessary liability insurance and the difficulty in checking titles and liens on Sunday. It was further held that the mere fact a statutory classification works a hardship on a particular segment of the commercial world is not sufficient reason to strike it down on constitutional grounds. 343 F Supp. 12.

Many states in addition to Michigan and Illinois have upheld far, far broader closing statutes than the one now in question. Most of the relevant cases are collected in an in-depth annotation

concerning the validity of Sunday closing laws found at 10 ALR 4th 246. See, for example, DIAMOND AUTO SALES v ERBE 251 Iowa 1330; 105 NW2d 650 (1960).

In closing on the question of whether this case presents a substantial federal question, Respondent notes that, in the area of economic legislation such as this, it is extremely doubtful that even a demonstrated lack of efficacy would suffice to establish a violation of substantive due process. EXXON CORPORATION v MARYLAND, 437 US 117, 125; 98 S Ct 2207; 57 L Ed 2d 91 (1934).

From a procedural jurisdiction standpoint, Respondent argues that Petitioner's failure to timely file its Motion for Reconsideration rendered that pleading nugatory. The proof of service date attested to in Petitioner's Appendix

E is irrelevant because, under MCR 7.313(D)(1), it is the time of filing (not service) which is relevant. Moreover, the Affidavit of Timely Filing contained in Petitioner's Appendix E is simply inaccurate, in view of the fact that Michigan Supreme Court Records, of which this Honorable Court may take judicial notice pursuant to FRE 201(2), reflect a late filing date of November 14, 1982. Thus, Petitioner's time for taking action in this case should be computed from the Michigan Supreme Court's October 22, 1986 denial of leave. When Petitioner's time is so-computed, it is clear that Petitioner has failed to timely pursue a remedy in this Court. U.S. Sup. Ct. Rules 11 and 22; 28 U.S.C.A.

From a procedural/jurisdictional standpoint, Respondent argues that

Petitioner's questions 4 and 5 do not belong before this Honorable Court because they were not raised and addressed below. WEBB v WEBB, 451 US 493; 101 US 1889; 68 L Ed 2d 392 (1981).

From a procedural jurisdiction standpoint, Respondent finally argues that the Michigan Court of Appeals' decision was not grounded on the United States Constitution and therefore does not present a federal issue. WEBB v WEBB, supra.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny this Petition for Writ of Certiorari.

Respectfully submitted,

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PROSECUTING ATTORNEY

By: Annette M. Gray
ANNETTE M. GRAY (P-28088)
Assistant Prosecuting Attorney
Chief of Appeals

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF SAGINAW)

I, ANNETTE M. GRAY, hereby certify that on this 25th day of June, 1987, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed postage prepaid to KAREN JEAN CHOATE, 3126 Davenport Street, Saginaw, Michigan 48602, and three copies were mailed to FRANK J. KELLEY, Attorney General, State of Michigan, Law Building, 525 West Ottawa, Lansing, Michigan 48913. I further certify that all parties required to be served have been served.

Annette M. Gray

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Subscribed and sworn to before me
this 25th day of June. 1987.

Geraldine Heritier

GERALDINE HERITIER, Notary Public
Saginaw County, Michigan
Ny commission expires:
August 22, 1988.